

# LEGAL ALERT

August 2002

## HEALTH CARE LAW UPDATE

### MODIFICATIONS TO THE HIPAA PRIVACY STANDARDS: FINALLY, SOME GOOD NEWS FOR HEALTH CARE PROVIDERS

*By: The HIPAA Project Team*

On Wednesday, August 14, 2002, the Department of Health and Human Services ("HHS") published in the Federal Register a final rule which sets forth numerous modifications and revisions to the HIPAA privacy standards, originally published in December of 2000. HHS published a proposed version of these modifications for comment in March of this year. (See the April 2002 SHRR Legal Alert, "Proposed Changes to the Privacy Standards: What's the Bottom Line?" on our web site [www.shrr.com](http://www.shrr.com)) Not surprisingly, most health care providers are expressing overwhelming support for HHS' modifications to the privacy standards, which incorporate all of the important changes proposed in the earlier version. Our Legal Alert of April 2002 still provides a good overview of those revisions. Therefore, we want to take this opportunity to discuss in greater detail one of the most meaningful revisions made to the privacy standards – the elimination of the consent requirement.

The final privacy standards published in December of 2000 contained a detailed and rather bizarre requirement that health care providers obtain a written consent from a patient before using patient protected health information for its own treatment, payment or health care operations purposes. Although confirming a patient's understanding of her rights and the ways in which her information is being used is not a bad thing, the consent requirement as it was written would have interfered with the normal delivery of patient health care services. Happily, these revised privacy standards will guarantee that treatment

is once again treatment, and that nothing about complying with HIPAA should interfere with a health care provider's delivery of good, quality care to its patients.

Specifically, as a result of revisions made to the final privacy standards, health care providers may continue to share information with one another about patients whom they are collectively treating in a coordinated effort. Referrals can be made and receiving physicians may use information provided in connection with a referral without hesitation or reservation. Patients can be transferred from institution to institution without concern for the scope or amount of information shared in connection with such a transfer. Information can be shared prior to the first opportunity to see the patient. And, first responders and emergency medical technicians are assured adequate access to relevant treatment information for payment purposes.

A few important points, however, should not be lost in the celebration and euphoria over these changes. For example, the elimination of the consent requirement, as it relates to health care operations, highlights the importance of covered entities evaluating and appropriately designating themselves as organized health care arrangements (OHCAs). Under these revisions, if an organization is qualified and appropriately identifies itself as an OHCA, members of the OHCA's medical staff can participate in peer review functions and operations without question. Absent such a designation, however, institutional providers, in particular, will need to consider whether physicians who currently participate in peer review

and other administrative functions are part of the provider's workforce or are business associates, and if they are business associates, how to modify medical staff bylaws or otherwise obtain business associate agreements with members of the medical staff in order to continue these peer review operations.

With the elimination of the consent requirement, the only areas of treatment, payment and health care operations where significant restrictions are likely to remain are in the areas of marketing and research. In these areas, specialized patient authorization is required before using protected health information. Health care providers are advised to continue to pay close attention to compliance in these areas.

Moreover, while HHS' elimination of the consent requirement is nothing but good news, health care providers should not forget that there are other requirements which remain within the privacy standards that do change the way health care providers currently operate, and continue to support the need for health care providers to invest the time to complete a gap analysis and to dedicate sufficient resources to ensure compliance with the privacy standards and all of the HIPAA regulations.

Specifically, as was highlighted in our April 2002 Legal Alert, HHS has reemphasized the importance of the Notice of Privacy Practices in the context of

ensuring individualized patient control over their protected health information. The requirements associated with the Notice of Privacy Practices, the information that must be contained within that document, as well as patient rights afforded with respect to the use and disclosure of patient protected health information, will require health care providers to alter their existing operations in order to ensure compliance. In addition, our work with health care providers relative to HIPAA compliance to date reflects that most health care providers are at risk relative to policies and practices for obtaining authorizations for the release of patient protected health information to friends and family members, and with regard to the process by which health care providers go about ensuring compliance with the expressed wishes of patients in this regard.

A full copy of the final rule containing the modification to the HIPAA privacy standards, a copy of the HHS press release associated with this final rule, this client alert as well as our Legal Alert from April of 2002 can all be obtained from our company website, [www.shrr.com](http://www.shrr.com). Anyone with questions regarding HIPAA, the privacy regulations, including these most recent modifications, should always feel free to contact any member of our HIPAA team at any time.

### **HIPAA PRIVACY & SECURITY STANDARDS: A RESOURCE FOR INITIAL ASSESSMENT AND IMPLEMENTATION**

The HIPAA Project Team has created a comprehensive binder and CD-ROM resource for conducting an initial review of HIPAA compliance and starting a compliance program. For ordering information, contact Wendy Passineau, Client Services Director, at 616.458.3636 or [wpassineau@shrr.com](mailto:wpassineau@shrr.com)

The members of  
**SMITH HAUGHEY RICE & ROEGGE'S**  
Health Care Law Department are:

William W. Jack, Chair	(616) 458-6243	Grand Rapids
William R. Jewell	(616) 458-8203	Grand Rapids
R. Jay Hardin	(231) 486-4534	Traverse City
Richard C. Kraus	(517) 318-5653	Lansing
Christopher R. Genther	(616) 458-0222	Grand Rapids
Veronica A. Marsich	(517) 318-5656	Lansing
Rachel Brochert Roe	(231) 486-4503	Traverse City
Mark A. Gilchrist	(517) 318-5654	Lansing
Michele M. Ekblad	(517) 318-5659	Lansing